(Clerk's Certificate)

United States Circuit Court of Appeals.
Eighth Circuit.

I, John D. Jordan, Clerk of the United
States Circuit Court of Appeals for the Eighth
Circuit, do hereby certify that the foregoing
seventy-three pages contain full, true and complete
copies of all pleadings, proceedings, and
record entries, in a certain cause wherein
[illegible] was Appellant and John A. Banks
is Appellee, No. 1791, December Term, 1902,
as full, true, and complete as the same remain
on file and of record in my office.

In testimony whereof, I hereunto sub-
scribe my name and affix the seal of said Cir-
cuit Court of Appeals, at office in the City of
St. Louis, Missouri, in the Eighth Circuit,
this twenty-second day of April, A. D. 1903.

John D. Jordan,
Clerk of the United States
Circuit Court of Appeals for
the Eighth Circuit.
[illegible] United States
Circuit Court of Appeals.
Eighth Circuit.)

21586

# In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 233.

ELMIRA KNEPPER, APPELLANT,

vs.

JOHN A. SANDS, APPELLEE.

On a Certificate of Questions Propounded by the Court of Appeals of the Eighth Circuit of the United States.

I. S. STRUBLE, *Attorney for Appellant.*
KING & STEARNS, *Attorneys for Appellee.*
M. B. DAVIS, *of Counsel for Appellee.*

## APPELLANT'S BRIEF AND ARGUMENT.

### STATEMENT.

While the questions for the determination by this court arise upon two interrogatories certified by the Court of Appeals; and while, as we suppose, this court will be largely guided by these interrogatories, we apprehend it will be desirous of obtaining all the light possible from such controlling facts as may be

contained in the bill, and hence we feel justified in asking the court to consider some of the more important facts falling, as we think, within the legitimate purview of the two questions propounded by the Appellate Court.

The action was brought by the appellee, John A. Sands, in the Eighth Circuit, Northern District of Iowa, Western Division, to recover the northwest quarter of section No. 9, in township No. 95 west, 5th principal meridian, situated in O'Brien County, Iowa, and to have cancelled a patent therefor, supposed at the commencement of the action to have been issued by the secretary of the interior to appellant, Elmira Knepper.

At the proper term of court, appellant's counsel filed a general demurrer to the bill, which, after argument, was overruled, exceptions being duly taken, and the cause appealed within time, to the United States Circuit Court of Appeals for the Eighth District, sitting in St. Louis, Mo. Argument upon the demurrer was heard by said court, and thereafter, and pending a final decision, the court certified the following two questions to the Supreme Court:

First. In view of the provisions of the act of congress of May 12, 1864, by virtue of which the land in controversy was granted to the State of Iowa, did the action which was subsequently taken in manner and form aforesaid, by the governor and legislature of the State of Iowa, operate as a final adjustment of the grant so far as the Sioux City and St. Paul Railroad Company was concerned, and by virtue of its being so adjusted, exempt, or except the grant in question from the provisions of the adjustment act of March 3, 1887?

Second. In view of the terms of the granting act of May 12, 1864, and the action subsequently taken in manner and form aforesaid by the State of Iowa, acting through its governor and

legislature, can Elmira Knepper, the appellant, be esteemed a purchaser in good faith, or a *bona fide* purchaser of the land in controversy, within the meaning of the fourth section of the adjustment act of May 12, 1864, as against John A. Sands, the appellee, who was in the open possession of the land in controversy and had erected valuable improvements thereon in manner and form aforesaid when said purchase was made?

The entire record of this cause has been certified up from the Appellate Court under Rule 37, and this court, therefore, has before it the bill, the demurrer, the opinion of the trial court, Hon. O. P. Shiras, and the decree.

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## ARGUMENT AND BRIEF.

It is our understanding of the rules of practice in this court that upon the certification of questions arguments may include reference to such material allegations in the bill as may throw light upon the questions propounded, and that such questions should not be so strictly construed as to preclude the counsel from a reference to such allegations as may in fact bear upon either of the questions propounded, and enable the court to more intelligently make answer to the questions; and with this understanding we shall endeavor to pursue a liberal, rather than a technical, construction of each question propounded.

### I.

The first question, and to some extent the second, calls for a construction upon an important part of the act of May 12, 1864, and the two acts of the legislature of the State of Iowa designated in the certificate.

Before citing authorities we call attention to the granting

act. This was a grant of lands to the State of Iowa in trust for the purpose of securing, through the aid thereby afforded, the building of two railroads, one of which, and the only one material to this controversy, was to be built from Sioux City, Iowa, to the south line of the State of Minnesota at such point as said state might select between the Big Sioux and the West Fork of the Des Moines River (certificate, page 1). The lands granted were subject to the disposal of the legislature of Iowa. The manner in which this should be done is fully set forth in section 4 of the act (certificate, page 2). This section contains most important provisions, which bear forcibly upon the first question your honors are called upon to answer.

It will be noticed that it is provided that upon the completion of either of said roads patents should issue for the balance of the lands to which said company might be entitled "to the state *for the uses aforesaid and none other.*" * * * "Provided further, that if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa *for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the state shall determine;* and, provided further, that said lands shall not in any manner be disposed of or encumbered except as the same are patented under the provisions of this act, *and should the state fail to complete said roads within five years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.*"

It is apparent that this grant did not contemplate that any of the lands included within its terms should be disposed of by the state for any other purposes than those named therein; also that should the state fail to complete said roads (after resuming

the lands referred to in case either company should fail to complete within ten years given within which to complete them, or either), then it should have no further power over them. The Sioux City and St. Paul Company has never completed its road. In 1872 it built south from the Minnesota line toward Sioux City as far as LeMars, Iowa, a distance of 53 13-100 miles. Nor has the State of Iowa ever taken any step toward securing the completion of the road.

By the granting act, if the roads were not completed within ten years from the date of the acceptance of the grant, it was provided that the lands granted and not patented should revert to the State of Iowa for the purpose of securing the completion of said roads within such time, not exceeding five years, upon such terms as the state might determine; and that if the state should for five years after the ten above referred to fail to complete the said road, then the lands undisposed of should revert to the United States. (Certificate, page 2.).

We maintain that it is perfectly plain from these provisions of the grant that the sole purpose was to accomplish the building of the two roads and to this end the state within a certain five-year period, on failure of either company to complete its road within a certain ten-year period, was given power to take up the incomplete project and complete it, making use, of course, of such lands as it might then hold, or thereafter receive from government for that purpose.

The State of Iowa accepted said grant April 3, 1866, and on the same day by appropriate legislation, conferred the land in controversy, and other lands, upon the Sioux City and St. Paul Company. (Certificate, page 3.) This company accepted the grant from the state on September 20, 1866. (Certificate, page 4.)

This latter date is the one from which the ten-year period, within which the company should complete its road, began to run; hence, according to the requirement of the congressional grant, this road should have been completed on September 20, 1876.

Thereafter, and within five years, or up to September 20, 1881, the state had the power to have the road completed as hereinbefore shown.

Instead of availing itself of this power within the time granted, it did nothing until March 16, 1882, when it passed an act resuming to itself all the lands which had not at that time been earned by the company. (Certificate, page 4.) But it will be seen from this act that no purpose to complete the road was contemplated by the state in passing said act, nor is it pretended, nor will it be claimed, that the state has ever taken a step to secure the completion of said road.

The state by the act of March 16, 1882, simply resumed to itself all the unearned lands pertaining to this road, and thereafter did absolutely nothing with or about them until the passage of the act of April 2, 1884, by which it relinquished to the United States all its right, title and interest in the lands so previously resumed, and authorized the governor to certify to the secretary of the interior a list of all lands theretofore patented to the state to aid in the construction of this road; but it was specially provided *"that nothing in this (act) contained shall be construed to apply to lands situated in the Counties Dickinson and O'Brien."*

This proviso is very significant. If it had any effect upon the lands in controversy and others in same condition, the effect was to retain the title thereto, and unless the United States has taken action to recover said lands, and has recovered them,

they remain in the state, and while the title is in the state no settler has ever had right of entry upon any of them.

It is certainly to be presumed from the fact of specifically retaining these lands the state did not intend that the United States should again become possessed of them; it is then immaterial what computation may have been made by state officials to ascertain the number of acres to which the Sioux City and St. Paul Company was entitled as between it and the state.

This was done prior to the act of the legislature of March 16, 1882, and the result was the state officials found that company had received 322,412.81 acres, which was all that it was entitled to receive according to the terms of the grant, and that the state still held the legal title to 85,457.41 acres pertaining to the grant to the Sioux City and St. Paul Company, no part of which had been earned by said company, or has since been earned; but, nevertheless, the state well knowing these facts, specially withheld from the United States which was alone entitled to receive them back, all the lands (and this land) situated in Dickinson and O'Brien Counties.

It cannot be shown that in the grant of May 12, 1864, nor in any subsequent act of congress, power was given the state of Iowa to thus assume control of these lands after fifteen years following their acceptance by this Sioux City and St. Paul Company. The state simply attempted to usurp power it did not possess, undoubtedly hoping congress would come to its relief and later give the lands to the state for some approved purpose. This was never done. Now while it may have been proper for the state to ascertain whether the company had received its proper quantity of lands so that a further and possibly unearned quantity might not be patented to it by the state, yet this ascertainment of quantity and the fact that the number of excess of lands

held by the state was also by the same process ascertained, it does not at all follow that the state did, or had, power to adjust the grant as between the company and the United States.

And the most satisfactory evidence that the United States did not consider that the grant had been adjusted between the government and the company is the fact that in 1890 the United States instituted suit in the Circuit Court of the United States for the Northern District of Iowa in the October term, 1890, against the Sioux City and St. Paul Railroad Company to recover these unearned lands. This action was carried to this court and decided by it in favor of the government October 21, 1895.

*159 U. S., 349. 40 L. Ed., 171 and 178.*

It will be noticed that this action was brought against the company and was not a proceeding in any form against the state.

That this suit and the result was by the United States regarded an adjustment of the grant of May 12, 1864, no one can reasonably controvert, particularly in the face of the circular letter of the secretary of the interior of date November 18, 1895, which clearly recognizes that the unearned lands remaining in the state for the benefit of the Sioux City and St. Paul Company were recovered in the suit above named. Transcript of record, page 17. It is there said, after a brief reference to what had taken place: "This leaves the title to the lands involved in the suit in the United States, and subject to disposal by the department," and following this, said department, in the same circular letter, gave specific directions for the restoration of said lands to the public domain and for their opening to settlement. (Transcript of record, page 17.)

And it will be noticed that, in order to avoid complications,

it was directed that the notice of restoration declare to all prior applicants that their applications conferred no rights upon them, and that upon the day set for the restoration of the lands, they would be opened to entry *and disposal* without regard to such prior applications, which, by the notice, should be held to be rejected. It was further provided that new applications might be presented and that in all cases of conflicting claims the register and receiver were directed to proceed in accordance with the rules of practice in contest cases. (Transcript of record, page 18.)

No attack is made by appellant upon the binding character of this circular; in short, it was acquiesced in by all parties. But prior to this time, and reasonably soon after settlers began to go upon these lands, certain of these persons made application to the secretary of the interior to have an action brought by the attorney general to have the title to these lands quieted in the United States, and with a view thereafter to make legal homestead entries thereon.

*S. C. & St. P. R. R. Co. vs. U. S., 159 U. S., 349. 40 L. Ed., pages 177-180.*

On July 26, 1887, the secretary rendered a decision on that application, in which he held that this grant—act May 12, 1864—*had not been adjusted.* The decision found that the Sioux City and St. Paul Railroad Company was still entitled to at least 4,101.88 acres out of 21,692.18 acres, as earned lands under the grant, and the secretary directed the commissioner of the general land office to make an adjustment of this grant in harmony with the findings made by him.

*6 L. D., p. 54-71.*

A demand was made upon the governor of Iowa for a conveyance back of these lands, failing to comply with which the

matter was referred to the attorney general of the United States, who brought the action to recover these lands found in 150 U. S., 349 ante. The land in controversy was a part of the land so recovered to the United States.

All these things go clearly to show that the government did not consider that the State of Iowa had adjusted this grant, or disposed of these lands.

But there is another and, as we think, a complete answer to appellee's claim that there was an adjustment of this grant between the government and the railroad company, or the State of Iowa, as a result of the action of the state legislature in passing the two acts of March 16, 1882, and of April 2, 1884, and that is the settled principle laid down by this court in Schulenberg vs. Harriman, 21 Wall., 44; 22 Law Ed., 551, in which it is declared that "No one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee but the grantor, or his heirs, * * * and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. No individual can assail the title it (the grant) conveyed on the ground that the grantee has failed to perform the conditions annexed." And on page 555, Law Ed., the court said: "If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property," etc.

Also see *Van Wyck vs. Knevals, 106 U. S., 360, 27 L. Ed., 201—sec. 204.*

*Citing with approval Schulenberg vs. Harriman, ante.*

Also see *U. S. vs. Southern P. R. Co., 146 U. S., 152, 36 L. Ed., 1091.*

See page 1101, where it is said: "No one but the grantor can raise the question of a breach of a condition subsequent." In U. S. vs Northern P. Ry. Co., 152 U. S., 284, 38 L. Ed., 443-449, on this last page the court says: "There can be no ques-"tion under the authorities cited, that if an act of forfeiture had "not been passed by congress the Atlantic and Pacific could yet "construct its road, and that constructing it, its title to these "lands would become perfect. No power but that of congress "could interfere with this right of the Atlantic and Pacific. No "one but the grantor can raise the question of a breach of con-"dition subsequent."

Also see following cases:

*Grinnell vs. Chicago, Rock Island and Pacific R. Co., 103 U. S., 739, 26 L. Ed., 456.*

*U. S. vs. Northern Pac. R. Co., 177 U. S., 436, 44 L. Ed., 836.*

*U. S. vs. Tenn. & Coosa R. R. Co., 176 U. S., 242, 44 L. Ed., 452.*

*Bybee vs. Oregon & Cal. R. R. Co., 139 U. S., 676, 35 L. Ed., 305.*

This last case holds that in case of a grant providing that all lands remaining unsold after ten years shall revert to the United States if road is not completed, does not *ipso facto* work a forfeiture on failure of completion.

Where lands are granted in aid of a railroad revert to the United States on failure to complete the road in ten years, those settling on such land after the ten years' limit and the non-completion of the road are possessors in bad faith, as the forfeiture can be insisted on only by the United States.

*Vicksburg, S. & P. R. Co. vs. Elmore, 46 La. Ann., 1237, 15 Southern, 701.*

And in same case held that where lands are granted in aid of a railroad, and the state is appointed a mere trustee, it cannot declare a forfeiture of the lands granted.

It seems to us that there being no power given the state by the granting act to make any adjustment, and there being no power in anyone, save the grantor, under the decision of this court to declare a forfeiture and effect an adjustment, the first question certified to this court must be answered in the negative.

II.

We now come to a consideration of the second question propounded by the court of appeals. In our judgment this question cannot properly be considered as a mere abstract proposition, but ought to be answered in the light of such allegations contained in the bill as are admitted by the demurrer, and as are material to the subject matter of the interrogatory.

Nor, in our opinion, should the question be considered solely upon the true facts embodied within it, viz: the terms of the granting act of May 12, 1864, and the action taken by the state of Iowa subsequent to May 12, 1864; nor yet alone upon the question and such statement of facts by the court of appeals as accompanies the question, because to thus adhere technically to the question and the two facts therein stated, might result in a denial of important rights of the appellant, which, upon the law and such material facts in the bill as are admitted by the demurrer (and only such facts as, under the rules of practice are admitted) filed in this cause.

For instance, and to make more plain our thought at this juncture, the bill makes no charge whatever of fraud against the appellant. It is not alleged nor intimated that by any deceit or circumvention, or any improper act whatsoever, the ap-

pellant mislead, or obtain an advantage, over the appellee.

There are no allegations against the appellant contained in the bill involving the least turpitude on her part. Aside from the occupancy and continued residence by the appellee upon the land in dispute and the non-occupancy and residence of the appellant thereon, the essential reasons why the appellee should be granted relief are to be found in paragraphs 15 and 17 of the bill. (Transcript of record, pages 13 to 15.) These are:

First. That appellant's contract was made after March 3, 1887.

Second. That the contract and lands affected thereby do not come within the terms of said act nor section 4 thereof.

Third. That title never vested in said company nor in any one for its use and benefit.

Fourth. The company had not earned the lands, nor entitled to them.

Fifth. The time within which it might earn them having long since elapsed.

Sixth. The state held the title under a special grant with power of adjustment and forfeiture, and had fully adjusted the grant and forfeited and resumed the lands.

Seventh. That said land grant was legally and fully adjusted long prior to the passage of the act of March 3, 1887.

Eighth. That this company had received the full amount of lands that it could receive, and the time having lapsed within which it could build the road or earn or receive more land.

Ninth. That the act of March 3, 1887, only applied to unadjusted land grants, and only to sales made in good faith prior to the passage of said act.

Tenth. The purchase by appellant was long after the foregoing things were done, and she was bound to take notice thereof,

and could not in law or equity be a good faith purchaser of the land.

Eleventh. Contract of purchase was void, same being contrary to provisions of the granting act of May 12, 1864, which prohibited the sale, transfer or encumbrance of said land until earned and patented to the company.

Twelfth. That at the time said purchase was made no sale or purchase could be made under the provisions of the act of March 3, 1887, nor could such a good faith purchase be made by appellant because of the acts of the State of Iowa in declaring that the company had already received all the lands it was entitled to receive and in forfeiting said lands to itself. (Par. 16 transcript, pages 13 and 14.)

Thirteenth. That by reason of long residence upon and cultivation of this land by appellee and his homestead rights and the premises, said appellee was and is entitled to have said land under the homestead laws of the United States.

Fourteenth. That the allowance of a patent to appellant is unlawful and contrary to law. (Par. 17 transcript, page 15.)

We challenge the attention of the court and counsel to the following statements:

First. That each of the foregoing allegations, except the first and fifth, is the statement of a mere legal conclusion not admitted by the demurrer.

*Dillon vs. Barnard, 21st Wall., 430, 22 Law Ed., 673-677.*

*Louisville & N. R. R. Co. vs. Palmes, 109 U. S., 244, 27 Law Ed., 922-925.*

Second. That neither of these various allegations, nor all combined, even were all admitted by the demurrer, amounts to a charge of affirmative fraud against the appellant. Appellant at

each argument below urged that no legal conclusion was admitted by the demurrer and said legal conclusions were pointed out. We wish to call the court's attention to another point as to which we think the court should be advised before it makes answer to this second question. The appellee is not entitled to a negative answer to this question because, among other things which will be stated later, when his application to enter the land as a homestead was rejected (certificate, page 5) it is not shown by the bill, nor will it be claimed by counsel, that he appealed from from such order of rejection; on the contrary, he submitted to the ruling and thereby became bound by it.

*In re. Wesley A. Cook, Vol. 4, Decisions of the Secretary of the Interior, page 187.*

*Parker vs. Gray, Vol. 2 same decisions, page 570.*

In the first of the above causes Cook filed in the local land office at Fargo Fitzgerald's formal relinquishment and at the same time attempted to file his own application, accompanied with proper affidavit and fee and commissions. The local land office, acting under circular instructions, transmitted the relinquishment to the commissioner of the general land office, and returned Cook's application papers and money to him. Fitzgerald's entry was cancelled April 3, 1884. On April 21, 1884, one Soules filed a regular application to enter the tract, and on April 22, 1884, Cook again attempted to file upon the tract which was rejected because of Soules' entry.

On appeal the secretary said: "But Cook failed to appeal from their action at that time, and by quietly waiting for the action of your office, has lost all rights that he might have perfected by diligence. The fact that now adverse rights have intervened will operate completely to bar his right to the land."

To same effect is the decision of the secretary of the interior

in Parker vs. Gray, above cited. The case involved an application of Gray to purchase the land, which application had been rejected, but no appeal was taken from the rejection, the appeal having been from an earlier ruling cancelling a former entry of his. The secretary held that he was concluded by failing to appeal from the order cancelling his entry, an adverse right having intervened.

In Burnham vs. Starkey (Kan.), 21 Pac., 624, the court, on page 629, said: "His (Starkey's) failure to appeal from the refusal of the land officers to allow him to enter the land, forbids him from asserting or maintaining a homestead claim," and it is added in substance, that the refusal of his entry could not have prevented him from prosecuting his homestead claim because he had a remedy by appeal if he had either equitable or legal rights.

Citing

*Brown vs. White, Copp. Pub. Land Laws, 298, 299.*

*Schuster vs. Grady, Ibid., 314—Zab. Land Laws, 63.*

These decisions are in harmony with the rules of the courts. In every case in which an appeal is allowable it must be taken and prosecuted, otherwise the aggrieved party is forever barred from thereafter asserting any interest in the question involved. No further citation of authorities is necessary.

In the further consideration of the second question we desire to call the court's attention in the first instance to the fact that by the provisions of the granting act the land was to be withdrawn from the market upon the filing of maps designating the routes of the roads (certificate, page 2). This was done. (Transcript 28.)

Thereafter and before the land had been opened to settlement by the land department the appellee settled upon the same.

Now did the settlement upon this land by appellee at this

time confer upon him any such rights, legal or equitable?

It is our understanding that no rights can be acquired under the pre-emption or homestead laws in lands withdrawn by order of the commissioner of the general land office.

*Thompson vs. St. Paul & M. & M. Ry. Co., 83 Fed., 546.*

*Riley vs. Welles, 76 U. S., 248—9th Law Ed., p. 648.*

*Wood vs. Beach, 156 U. S., 548—39 L. Ed., 528.*

*Butts vs. N. P. R. R. Co., 119 U. S., 55—30 L. Ed., 330-7.*

*Woolsey vs. Chapman, 101 U. S., 755—25 L. Ed., 915. See page 920.*

No pre-emption or homestead claim attaches to a tract of land until an entry in the local land office is made.

*N. Pac. R. Co. vs. Coburn, 164 U. S., 385—41 L. Ed., 479.*

*Kan. Pac. R. Co. vs. Dunmeyer, 113 U. S., 629—28 L. Ed., 1122, 1127.*

An order of the land department withdrawing from sale all lands in a certain district which have been granted for a railroad not yet located, is sufficient to defeat a subsequent pre-emption of land thus withdrawn, although more land was withdrawn than necessary.

*Wolcott vs. Des Moines, etc., Co., 72 U. S., 681—18 L. Ed., 689.*

*Spencer vs. McDougall, 159 U. S., 62—40 L. Ed., 77.*

Where one moved upon public land in October, 1866, but made no attempt to enter it as a homestead until the succeeding spring, and after the withdrawal of the same from entry and sale had been ordered by the secretary of the interior, he acquired no equitable rights superior to the legal title subsequently

conveyed to a railroad company, although he had permission from the register to occupy the land.

*Maddox vs. Burnham, 156 U. S., 544—39 L. Ed., 527.*

Settlement on public lands of the United States, no matter how long continued, confers no right against the government.

The land continues subject to the absolute disposing power of congress until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase money.

*Frisbie vs. Whitney 76 U. S., 187-197—19 L. Ed., 668.*

*Opinions of Attorney General, 8 Vol., 72.*

*Opinions of Attorney General, 10 Vol., 57.*

In Frisbie vs. Whitney, ante, it was claimed that because complainant—the settler—did all that was in the power of any one to do towards perfecting his claim, he should not be held responsible for what could not be done. The court replied as in Rector vs. Ashley, 6 Wall., 142—18 L. Ed., 733, "that the rights of claimant are to be measured by the acts of congress, and not by what he may or may not be able to do; and if a sound construction of these acts shows that he acquired no vested interest in the land, then as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient." Citing

*Bagnell vs. Brogedick, 13 Pet., 436.*

*Barney vs. Gamble, 3 How., 32.*

In Hutchins vs. Low et al., 82 U. S., 77—21 Law Ed., 82, which affirms Frisbie vs. Whitney, ante, the court held that a party, by settlement upon lands of the United States, with a declared intention to obtain a title to the same under the pre-emption laws, does not thereby acquire a vested interest in the prem-

ises as to deprive congress of the power to divert it by grant to another party. In Bullard vs. Des Moines and Fort Dodge R. R. Co., 7 Sup. Ct. Rep., 1159, which was a cause arising in Iowa on the claim of the plaintiff as a settler upon the land after it had been withdrawn from settlement, the court, among other things, said: "If these lands were at the time of these settlements and pre-emptions effectually withdrawn from settlement, sale or pre-emption by the orders of the department, which we have considered, there is an end of plaintiff's title: for by that withdrawal, or reservation the lands were reserved for another purpose to which they were ultimately appropriated by the act of 1862, and and no title could be initiated or established because the land department had no right to grant it."

To same effect is Butts ex. et al. vs. N. P. Ry. Co., 7 Sup. Ct. Rep., 100-106.

The settled law in the federal courts is that, so long as an executive withdrawal of public lands continues in force the lands covered thereby are not subject to entry, and no lawful settlement on them can be acquired.

*O'Connor vs. Gertgens, 89 N. W. R., 866, 869 and page 94, No. 3 Ad. Spect. U. S. S. Ct., Oct. term, 1903.*

Which cites

*Wolsey vs. Chapman, 101 U. S., 768—25 L. Ed., 915.*

*Bohall vs Dillo, 114 U. S., 49—29 L. Ed., 61.*

*Bullard vs. Railroad Co., 122 U. S., 167—30 L. Ed., 1123.*

*Spencer vs. McDougall, 159 U. S., 60—40 L. Ed., 76.*

*Railroad Co. vs. Smith, 177 U. S., 260—43 L. Ed., 157.*

In view of the decisions above referred to it seems to us that the settlement by Sands upon the land in controversy at the

time it was made gave him no rights, legal or equitable, in the same.

It may be argued by appellee's counsel, and in fact it is suggested in the question certified, that appellee has made valuable improvements on the land, and this will be urged as a reason why the patent should be set aside. But before these were made he had full knowledge of all legislation regarding the land, and he erected these improvements upon property known by him to have been withdrawn from entry long before settled upon and never restored to entry until after his settlement, and he made them after an application to enter it as a homestead had been denied by the proper officers. Any improvements that have been placed upon this property have been so placed at the risk of appellee, well knowing, as he must, that litigation was sure to follow to determine whether he had any rights at all in the property, and in this connection we call the court's attention to the following:

Mere occupancy of the land in dispute and the making of improvements thereon by appellee, gave him under the facts of this case no vested right therein as against the United States or appellant.

*Tow vs. Manley, 29 L. D., 504, and authorities cited.*

In Sparks vs. Pierce, 115 U. S., 408—29 L. Ed., 429, at bottom of page it is said: "Mere occupancy of public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them."

We now wish to call the attention of the court to the act of March 3, 1887, in view of the fact that it is an important element in interrogatory two. The bill alleges (par. 16, transcript page 15) that the secretary of the interior was about to issue, or

had issued, a patent to the land in controversy as purchasing claimant, solely under her contract of purchase under the fourth section of the act of March 3, 1887, and it is in the same connection alleged that allowing said purchasing claimant to enter and take said land by reason of, and by virtue of said contract made with said Sioux City and St. Paul Railway Company aforesaid, and under the fourth section of said act, or any other section thereof, was contrary to law and absolutely void. (Transcript, page 15.)

The Court of Appeals in the second question ask whether the appellant, Knepper, can be esteemed a purchaser in good faith of the land in controversy within the meaning of the fourth section of the said act of March 3, 1887, as against the appellee, Sands, under all the conditions supposed in the question, he being in open possession of the land and owning valuable improvements thereon when the purchase was made by Knepper.

We have already argued upon such of the facts presented in the bill as are admitted by the demurrer, that at the time Sands entered upon the land he had no right in law or equity to do so, it having years before been legally withdrawn from settlement; also that by failing to appeal from the decision of the register and receiver refusing to allow him to make entry upon this land under the homestead laws, so that the discussion at present can be narrowed to a consideration of the act of March 3, 1887, or the provisions thereof applicable to the second interrogatory. The act provides for the adjustment of land grants in aid of the construction of railroads, but is also one for the protection of good faith purchasers of lands erroneously certified, or patented, by the United States *to or for the use or benefit of* any company claiming by, through, or under, grant from the United States to aid in the construction of a railroad. We conceive it important

to note that the lands referred to are such as may have been *erroneously certified, or patented* by the United States *to or for the use or benefit* of any company, etc.

Section 4 seeks to protect persons who might have purchased, or might thereafter purchase, any of these lands described above.

Mrs. Knepper claims to be a good faith purchaser of a quarter section of land which had, as she claims, years prior to her purchase, been certified and patented by the United States to the State of Iowa for the use and benefit of such railway company, as might thereafter build a road from Sioux City, Iowa, to the south line of the State of Minnesota, or such part thereof as might be approved by the State of Iowa.

We have heretofore shown that no charge of fraud or bad faith is made against her, hence as it seems to us one of the material question is: "Did she purchase a quarter section of the lands which had been patented to or for the use of the Sioux City and St. Paul Railroad Company?" In exhibit C attached to plaintiff's bill, being the decision of the commissioner of the general land office on the appeal of Mrs. Knepper from the decision of the register and receiver (transcript of record, page 23), the commissioner states: "This tract was within the primary limits of the grant to the State of Iowa, May 12, 1864, to aid in the construction of a railroad from Sioux City to the south line of the State of Minnesota, which grant was conferred by the state upon the Sioux City and St. Paul Railroad Company; it is opposite to the constructed portion of the road, and was patented to the state for the use of said railroad, June 17, 1873."

This quotation from an exhibit of appellee contains five distinct and important facts, viz:

First. That the land in suit was within the primary limits of the grant of May 12, 1864.

Second. That the grant was made to aid in the construction of a railroad from Sioux City to the south line of the State of Minnesota.

Third. That the grant was conferred by the state upon the Sioux City and St. Paul Railroad Company.

Fourth. That the land is opposite to the constructed portion of the road, and,

Fifth. That this land was patented to the State of Iowa for the use and benefit of said railroad June 17, 1873.

These facts, together with the purchase of the land by appellant, brings the case squarely within section 4, act of March 3, 1887, and the questions, as we think, should be answered with reference to this section as contemplated by the second interrogatory, together with other important facts shown by the bill. It then appears that Mrs. Knepper was a good faith purchaser unless the mere fact that Sands was in possession of the land as a qualified homesteader, with improvements made, made her purchase one of bad faith. But it could not be in bad faith simply because of these facts of possession and improvements. There must accompany these one or more legal or equitable rights which give Sands superior claims to this land.

We ask the court to bear in mind that appellee does not make any claim to this land because of section 5 of the act of March 3, 1887. It is nowhere suggested in the bill, nor has it heretofore been urged in argument that, by reason of this section, the appellee's contention should be sustained.

The lands referred to in section 5 are clearly those "not conveyed to or for the use of such company," and, as we have shown, the quarter section in controversy was patented to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company, and hence is clearly within section 4

of the act of March 3, 1887, as is conceded by the bill, and therefore, in no proper view, as we think, can section 5 be applied to the case as presented by the questions submitted.

We further urge that, by the provisions of section 1 of chapter 29, acts 54 congress, approved March 2, 1896, 29 statutes at large, p. 42, ch. 39, the appellant is protected. This court in U. S. vs. Winona & St. Peter R. Co., 165 U. S., 463—41 Law Ed., 789, has construed the act of March 3, 1887, act of February12, 1896, act of March 3, 1891, and of March 2, 1896. Appellant relies upon these acts as sustaining his right to the land in controversy, and attaches special importance to the last cited act, which, among other things, provides: "But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed," a provision recognized as of much force in U. S. vs. Winona & St. Peter R. Co., ante, on page 795—41 L. Ed.

And in U. S. vs. Southern Pac. R. Co., 184 U. S., 49—46 L. Ed., 425, this court made further reference to these laws and distinctly says on page 428, L. Ed.: "These acts were passed for the purpose of upholding the titles of parties who in good faith had purchased from railroad companies lands which, though supposed to be part of their grants, proved not to be so."

This case also settles against appellee an important claim made in the bill, viz: that there could be no good faith purchase after the passage of the act of March 3, 1887. (See transcript, page 13, par. 15, for appellee's claim, and U. S. vs. Southern Pac. R. Co., 184 U. S., 55 to 57—46 L. Ed., page 429.)

The claim of appellee that a purchase in good faith after the passage of this act was one of the main grounds for relief.

In Button vs. Drake, 14 L. D., 18, the secretary of the interior decided that when lands erroneously certified or patented

were again in the United States, they came free and clear of *all claims except those of purchasers from the railroad company.* If this be true then Sands, having no right of entry of the land while the title was outstanding in the state, and Mrs. Knepper being a good faith purchaser under the definition given in U. S. vs. Winona & St. Peter, ante, page 796 of L. E. 41, at and prior to the recovery of this land to the United States, there can be no right or equity in Sands which will justify a decision in his favor.

In addition to the facts already cited and argued as reasons why Sands had no right or equities in the land, we wish to present and argue two other points: First, that Sands had abandoned his original attempt to make a homestead filing on this land, and, second, he is concluded by the final result of the contest proceedings set forth in the bill. And now as to the first of these two points: He tendered his first homestead filing some time in 1884 (transcript, page 12, certificate, page 5), which was rejected. But from par. 16, page 14, of transcript, and from appellee's exhibit C (transcript, page 24), it appears that he abandoned that attempted filing and undertook to pursue another and distinct remedy, viz: a proceeding under the act of March 3, 1887, in which he filed application to make proof under said act, which could have been made only under section 3 thereof. But he was not content with this attempt, for it appears on same page (24) of the transcript, that on March 10, 1896, Sands again filed a homestead application for this land, alleging settlement thereon in 1884.

His conduct was certainly an abandonment of his first application for permission to file a homestead entry in 1884, and, having abandoned his application made in 1884, and presented

two thereafter—one on January 21, 1896, to make proof under act of March 3, 1887—Sands certainly cannot be heard to complain against the decision of the secretary of the interior, found on pages 27 to 28 of the transcript, when it is remembered that he not only abandoned his first application to enter the land as a homestead on being denied this privilege, but failed to appeal therefrom, and when later, as we have shown, and as his bill plainly discloses (transcript, pages 14-15, par. 16), he voluntarily appeared in the contest ordered by the commissioner of the general land office and submitted to the hearing of said cause in accordance with said order, he must be held to have abandoned all prior claims and to be bound by the result, unless he has plainly set forth in his bill, first, facts as contradistinguished from legal conclusions, showing fraud, or gross mistake in the findings of the department; or second, serious misconstruction of the law applicable to the facts found; and if either is relied upon the specific facts must be stated and the misconstruction of law must be clearly manifest.

*Quimby vs. Conlon, 104 U. S., 422, 428, 441—26 L. E., 802.*

In James vs. Germania Iron Co., 107 Fed., 597, on page 60, 601, Circuit Judge Sanborn says: "If he would attack the patent on the latter ground (fraud or gross mistake), and avoid the department's finding of facts, however, he must allege and prove not only that there was a mistake in the finding, but the evidence before the department from which the mistake was made, the way in which it occurred, and the fraud, if any, which induced it, before any court can enter upon the consideration of any issue of fact determined by the officers of the department at the hearing," citing:

*U. S. vs. Northern Pac. R. Co., 95 Fed., 864, 870, 882.*

*U. S. vs. Atherton, 102 U. S., 372, 374—26 L. Ed., 213.*

*U. S. vs. Budd, 144 U. S., 154, 167, 168—36 L. Ed., 384.*

*U. S. vs. Mackintosh, 85 Fed., 333, 336.*

*U. S. vs. Throckmorton, 98 U. S., 61, 66, 68—25 L. Ed., 93.*

*Morquez vs. Frisbie, 101 U. S., 473, 476—25 L. E., 800.*

*Steel vs. Refining Co., 106 U. S., 172—28L. Ed., 812.*

*Ehrhardt vs. Hogaboom, 115 U. S., 67, 69.*

*Heath vs. Wallace, 138 U. S., 573, 575.*

*Barden vs. R. R. Co., 154 U. S., 288.*

When upon the facts found, conceded or established without dispute at the hearing before the department, its officers have fallen into an error in the construction of the law applicable to the case which cause them to refuse to issue the patent to the rightful party, then the patent may be set aside. (James vs. Germania Iron Co., ante, 600) but we apprehend until the facts so "found, conceded or established," are made to appear, the court under the authorities cannot say whether an error was committed in the application of the law to such facts, and hence we claim the action of the department must be held to be final, and if final, then certainly the first question must be answered in the negative and the last one in the affirmative.

But it will be borne in mind that no allegations of fraud or gross mistake in the proceedings before the interior department are found in the bill. It is simply claimed as matter of conclusive statement:

First. That, by reason of his settlement upon the land under the conditions of federal and state legislation stated, and the making of improvements as alleged, and,

Second.—Because, as matter of law, upon the facts presented, and the purchase *after* the act of March 3, 1887, (which, it is claimed, could not be legally made because subsequent thereto), the appellee is entitled to the land.

There being no charge of fraud or bad faith in the purchase by Mrs. Knepper, and this court having, in U. S. vs. Southern Pac. R. Co., ante, decided that there could be a good faith purchase subsequent to the passage of the above named act, the case would seem to have been correctly ruled by the department. The facts as found, and the law as laid down by the secretary, unite under the numerous decisions of this court to settle the controversy against the appellee.

Finally, the possession of Sands imparted under the law no notice to Mrs. Knepper of any fact which made her a purchaser in bad faith. Much may be claimed for Sands because of his possession of the land when purchased by Mrs. Knepper. We have shown, as we think, that his possession was unlawful because the land at the time he entered upon the same, had been withdrawn from market, that he abandoned his claim of right to enter the same by attempting to make a new filing of homestead entry in 1896, and also by making application to make proof under the act of March 3, 1887, and that in meantime, between his settlement upon the land, in 1884, and his application the same year to enter the same as a homestead—and his later attempted filing of homestead entry in 1884—Mrs Knepper Sands, on June 21, 1887, purchased the same in good faith, and hence acquired superior rights and equities in and to the land, and we contend that, having a right to purchase, and purchasing in good faith, she cannot be relegated to an inferior position simply because Sands was in possession and had improved the land. But what virtue ex-

isted in his favor under the law of notice to others dealing with the land while he was in possession? Jones, in his Law of Real Property, 2d vol., sec. 1565, says: "If the person in possession has no title or right of possession whatever, but is a mere intruder, his possession is not notice and does not put a purchaser on inquiry," citing:

*Western Mining & Mfg. Co. vs. Coal Co., 8 W. Va., 406.*

*Writ vs. Wood, 23 Pa. St., 120.*

Wade on Notice, 2d Ed., sec. 294, says: "It is also essential that the possession, which is to operate as notice of title shall be contemporaneous with the existence of the right and title it is relied upon to establish and prior to the subsequent purchase. Therefore it was held in an action of ejectment, that although the defendant was in actual, open, undisputable and exclusive possession of the premises in question, holding under a quit claim deed at the time the same was conveyed to the plaintiff, such possession was only notice of such title or interest as he then had."

And in U. S. vs. Winona & St. Peter R. Co., 165 U. S., 463—41 L. Ed., 789, beginning at bottom of page 796, L. Ed., the court says: "It matters not what constructive notice may be chargeable to such a purchase (under sec. 4, act March 3, 1887) if in actual ignorance of any defect in the railroad company's title, and in reliance upon the action of the government on the apparent transfer of title by certificate or patent, he has made an honest purchase of the lands. The plain intent of this section is to secure him the lands, and to reinforce his defective title by a direct patent from the United States and leave the government a simple claim for money against the railroad company."

But suppose Mrs. Knepper was, by reason of Sands' possession, put upon inquiry, what would she have learned? On go-

ing to the land office at Des Moines she would have learned that this land had long since been withdrawn from entry and market; that while it was so withdrawn Sands had, in 1884, proffered his homestead application and fees at this office; that the application had been denied and no appeal taken from said decision, and hence she would have learned that Sands had no right, title or interest, legal or equitable, in this land. So we insist Mrs. Knepper is not prejudiced by reason of the possession of Sands when she made her purchase.

We give notice of oral argument at the hearing of the interrogatories.

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